2004 WL 5328714 (La.Civil D.Ct.) (Trial Motion, Memorandum and Affidavit)
Civil District Court of Louisiana.

Janet F. VICKNAIR, Divorced Wife of Gary J. Vicknair,

v.

FIREFIGHTERS' PENSION and Relief Fund in the City of New Orleans and Marzell R. Vicknair.

No. 02-15071.
April 2, 2004.

Division “F”

Memorandum of Law in Support of Motion for Summary Judgment

William H. Cook, Jr. (Bar #4307), Trial Attorney, 7428 Benjamin Street, New Orleans, LA 70118-3704, Telephone: (504) 861-7540, Facsimile: (504) 865-9378, Attorney for Plaintiff Janet F. Vicknair.

SECTION 10

INTRODUCTION

This is a long memorandum because it deals with an unusual and complex issue. The Firefighters' Pension and Relief Fund In the City of New Orleans (the “Firefighters' Fund”) has stated that it will not honor a judgment of this Court requiring them to make direct payment to Janet F. Vicknair. The Firefighters' Fund apparently takes the position that Federal law bars them from honoring a Judgment of this Court. This Memorandum shows that: 1) Janet Vicknar has a right to a 19.42% payment, 2) The Firefighters' Fund has the obligation to honor a Judgment of this Court under Louisiana law, and 3) Federal law does not apply to any legal issue before this Court.

Paragraph 10 of the Ms. Vicknair's Petition states:

“10.

Plaintiff has been informed by the Fund that if she obtained a Judgement against Defendant Marzell R. Vicknair entitling Plaintiff to 19.42%, or other percentage, of the monthly survivorship benefit being paid from the Fund to Defendant Marzell R. Vicknair, the Fund would not honor such a Judgment and would not make a direct payment from the Fund to Plaintiff of the amount required to be paid to Plaintiff under such a Judgment. Plaintiff, therefore, asks this Court for a declaration that Fund is bound to directly pay to Plaintiff any percentage of the monthly survivorship payment to Defendant Marzell R. Vicknair which this Court finds should be paid to Plaintiff' The Firefighters' Fund answered:

“9.

The allegations contained in the paragraph misnumbered “10” are admitted to the extent that the Fund will not recognize a Judgment awarding payments directly to plaintiff from the Fund. The remaining allegations request relief from this Court and require no answer from the Fund.”

I. REQUIRED STATEMENT -UNIFORM DISTRICT COURT RULES 9.10(2)

A. UNDISPUTED ISSUES OF MATERIAL FACT

All alleged facts can be proven by either i) The September 1, 2002 Affidavit of Janet Vicknair which is attached to the original Petition and verifies all of the factual statements in the Petition, ii) the admissions in the Answer of the Firefighters' Fund, and iii) the November 17, 2003 Affidavit of Richard J . Hampton, Jr., with it's attachments, certifying that the attached information are true and correct records of the Firefighter's Fund. All three are now in the possession of the counsel for the Firefighters' Fund. None of the facts listed below have been disputed.

1. Janet Vicknair married Gary R. Vicknair in Louisiana.

2. During the marriage Gary R. Vicknair was an employee of the New Orleans Fire Department and a participant in the Firefighters' Pension and Relief Fund in the City of New Orleans.

3. Janet Vicknair was divorced from Garyl R. Vicknair.

4. On May 17, 1989 Judgment was entered in *Janet Falgous wife of Gary Vicknair v. Gary Vicknair,* Proceeding No. 539-845, Civil District Court For the Parish of Orleans. [the “Judgment.”]

5. The Judgment contained the following provision:

> “ IT IS FURTHER ORDERED, ADJUDGED AND DECREED that with respect to all payments due after May 11, 1989, the said Firefighters' Pension and Relief Fund pay 19.42% of each payment due by separate check to Janet F. Vicknair at her address.- - -”

6. The Judgment was submitted to the Firefighters' Pension and Relief Fund and accepted by them. The Firefighters' Fund began to pay 19.42% of Mr. Vicknair's gross retirement check to Janet Vicknair beginning at the end of June 1989.

7. Gary Vicknair later married Marzell R. Vicknair, a defendant in this Proceeding, on June 4, 1992.

8. Gary Vicknair died December 6, 2001.

9. Shortly after the death of Gary Vicknair the Firefighters' Fund ceased monthly payments to Janet Vicknair.

10. On January 9, 2002 the Board of Trustees of the Firefighters' Pension and Relief Fund granted a Line of Duty Widows Death Benefit of $2,071.73 per month to Martzell Vicknair, retroactive to December 1, 2001.

11. Janet Vicknair requested that the Firefighters' Fund pay her a community property share of 19.42% of the survivor benefit being paid to Marzell Vicknair. This application was refused.

12. Janet Vicknair has obtained a preliminary Judgment by Default against Marzell Vicknair establishing that Janet Vicknair has a 19.42% community property ownership interest in each monthly payment Marzell Vicknair receives from the Firefighters' Fund. Confirmation of that Default Judgment has been argued to the Court and has been continued to the date of the trial of this Summary Judgment.

B. MOVER'S ESSENTIAL LEGAL ELEMENTS

1. Janet Vicknair was the owner under Louisiana law of a 19.42% community property interest in “all payments” [the language of the Judgment in A (5) above] from the Firefighters' Fund because of employment of Gary Vicknair during the marriage.

2. In Louisiana statutory survivor benefits paid by Revised Statutes Title 11 government retirement programs are subject to community property claims.

3. Janet Vicknair owns a 19.42% community property interest in the Line of Duty Widow's Benefit being now being paid by the Firefighters' Fund to Marzell Vicknair.

4. The Firefighters' Fund has the legal obligation under Louisiana law to pay directly to Janet Vicknair her 19.42% community property share of the gross monthly benefit paid to Marzell Vicknair.

5. Federal law does not apply in this situation and does not restrict any payment by the Firefighters' Fund to Janet Vicknair. This Memorandum will divide the issues into three Sections.

COMMUNITY PROPERTY [Section II]

19.42% of the monthly survivorship benefit paid by the Firefighters' Fund to Marzell Vicknair is the property of Janet F. Vicknair because it is a part of her share of the community which existed between her and the deceased Gary R. Vicknair. She has direct ownership of this interest under the community property law of Louisiana.

DIRECT PAYMENT OBLIGATION UNDER LOUISIANA LAW [Section III]

The Firefighters' Fund has the obligation under Louisiana law to make direct payment to Janet F. Vicknair of this 19.42% amount each month that it makes a payment to Marzell R. Vicknair. No regulation of the Firefighters' Fund can defeat it's obligation to make direct payment of this amount to Janet F. Vicknair.

NO PROVISION OF FEDERAL LAW PREVENTS THIS DIRECT PAYMENT [Section IV]

The Firefighters' Fund is a government retirement program which is completely exempt from any provision of Federal law which requires a Qualified Domestic Relations Order (QDRO) before a State Court can issue a Judgement granting transfer of a covered retirement plan interest in connection with a divorce. Existing Federal jurisprudence involving survivorship benefits and QDRO's cannot be applied to prevent the Firefighters' Fund's Louisiana law direct payment obligation.

II. COMMUNITY PROPERTY INTEREST OWNED BY JANET VICKNAIR.

It is horn book law in this State that to the extent that a pension right derives from the spouse's employment during the existence of the marriage, it is a community asset subject to division upon dissolution of the marriage.

The latest comprehensive restatement of the law relating to the division of retirement benefits is in *Robinson v. Robinson*, 99-3097 (La. 1/18/01), 778 So.2d 1105:
“This court decided in T.L. James & Co., Inc. v. Montgomery, 332 So.2d 834 (La. 1975) that an employee's contractual pension right is not a gratuity but a property interest earned by him.

To the extent that the right derives from the spouse's employment during the existence of the marriage, it is a community asset subject to division upon dissolution of the marriage. La.Civ.Code art. 2338; Sims v. Sims, 358 So.2d 919 (La. 1978); T.L. James & Co., Inc. v. Montgomery, 332 So.2d 834 (La. 1975). Consequently, when the community is terminated, the employee's

spouse is entitled to be recognized as the owner of one-half of the value attributable to the pension or deferred compensation right earned during the existence of the community. La.Civ.Code art. 2336; La.R.S. 9:2801 (1991); Sims, supra at 923-24; T.L. James & Co., supra; see generally, Messersmith v. Messersmith, 229 La. 495, 86 So.2d 169 (1956); - - -. Emphasis Supplied, 778 So.2d at 1114

For similar statements of the law see: *Daigre v. Daigre* 228 La. 682, 697 83 So.2d 900 (La. 1955); Sims v. Sims, 358 So.2d 919, 921 (La. 1978); *Hare v. Hodgins,* 586 So.2d 118.122 (La 1991); *Fraizer v. Harper,* 600 So.2d 59, 61 (La. 1992), and; *Johnson v. Wetherspoon.* 694 So.2d 203, 205 (La. 1997).

The Louisiana Supreme Court has long determined that the interest of a former spouse in the community is a true ownership interest. In Succession *of Wiener* 203 La 649, 14 So.2d 475 (La. 1943) the court held that the State of Louisiana could not impose an inheritance tax on the wife's share of the community at the death of the husband because she was the direct owner of her community interest from the time it was acquired and she did not acquire her community interest on the death of the husband:
That this community is a partnership in which the husband and wife own equal shares, their title thereto vesting at the very instance such property is acquired, is well settled in this state *Succession of Wiener,* 14 So.2d at 657

In Louisiana, the situation is entirely different, for here the civil law prevails, and the theory of the civil law is that the acquisition of all property during the marriage is due to the joint or common efforts, labor, industry, economy, and sacrifices of the husband and wife; in her station the wife is just as much an agency in acquiring this property as is her husband. In Louisiana, therefore, the wife's rights in and to the community property do not rest upon the mere gratuity of her husband; they are just as great as his and are entitled to equal dignity. Unlike the wife's interest in the common law states, where joint tenancies and tenancies by the entirety abide, the wife's interest in the community property in Louisiana is more than a mere expectancy or hope and her husband's death is not the force that generates her title thereto and her rights therein. Over a hundred years ago, in the case of Dixon v. Dixon's Ex'rs, 4 La. 188, 23 Am. Dec. 478, this court held that the rights of the wife, as well as those of the husband, in and to the marital gains, grow out of the marriage contract itself and do not originate only when it is dissolved, and this is now our settled law, as was pointed out in the case of Phillips v. Phillips, 160 La. 813, 107 So. 584. She is the half-partner and owner of all acquisitions made during the existence of the community, whether they be property or income.- - -

[Emphasis Supplied]

Succession of Wiener, 14 So.2d at 665, 666

The Louisiana Supreme Court has also decided spouse.in *Johnson v. Wetherspoon,* 96-0744 (La. 5/20/97), 694 So.2d 203 that statutory survivor benefits to a spouse at the time of death are subject to the community property claims of a prior spouse. *Wetherspoon* dealt with a statutory survivor annuity under the Teacher Retirement System of Louisiana, a Title 11 retirement plan, although the death was before retirement rather than after. *Wetherspoon* also involved a statutory survivor benefit which would not have been payable if the plan participant had not been married at the time of his death. In *Wetherspoon,* as in this case, the spouse receiving the survivorship benefit was married to the deceased after retirement. The Court directly held that the first spouse had a community property interest in the survivorship benefit:
Not only did Sims decline to distinguish between retirement benefits and survivors benefits, but the Court cited with approval its earlier decision in T.L. James, where it determined that survivor benefits were community property and a former spouse in community was entitled to share in those benefits to the extent they were attributable to time and effort the former spouse spent in community with the member spouse. T.L. James, 332 So.2d at 856. Therefore, recognizing this Court's previous decisions that declined to distinguish between retirement and survivor benefits, we likewise decline to now treat the payment of retirement and survivor benefits differently

Wetherspoon 654 So.2d at 207

It is the duty of courts to interpret laws on the same subject matter in reference to each other. La.Civ.Code art. 13. Thus, we adopt a construction of TRSLA that harmonizes and reconciles it not only with other statutes dealing with the same subject matter, but also with general community property laws. As stated above, applying community property principles to survivor benefits, as they are already applied to retirement benefits, accomplishes this goal. Therefore, unless specifically provided for otherwise by the legislature, any benefit payable by a retirement plan, to the extent attributable to the community, is an asset of the community. Applying this rule to the present facts, we conclude that the legislature did not intend to exempt survivor benefits payable by TRSLA from the claims of a former spouse in community. The court of appeal correctly overruled the defendant's motion for summary judgment and remanded the case to the trial court for further proceedings.

[Emphases Supplied]

Wetherspoon 654 So.2d at 211

The first spouse in *Wetherspoon* was claiming what Ms. Janet Vicknair, the first spouse in this litigation is claiming: 1) her community interest in all future survivorship retirement plan payments, and 2) recovery of the community share of all retirement plan benefits already paid and received. In *Wetherspoon* these issues were remanded. Only the demand for future retirement plan payments is the subject of this Motion.

III. DIRECT PAYMENT OBLIGATION UNDER LOUISIANA LAW

A. The 19.42% interest is directly payable under Louisiana jurisprudence

There is an anti-alienation statute in the statutes creating the Firefighters Pension and Relief Fund for the City of New Orleans at R.S. 11:3389. This statute states:
The right of a person to a pension, an annuity, a retirement allowance, or to the return of contributions; the pension, annuity or retirement allowance itself; any optional benefit or any other right accrued or accruing to any person under the provisions of this Part; and the monies in the various funds created by this Part are exempt from any state or municipal tax; all state income tax; and exempt from levy and sale, garnishment, attachment or any other process whatsoever, and shall be unassignable except as otherwise specifically provided in this Part. The fund shall be sacredly held, kept, and secured and distributed for the purpose of pensioning the persons named in this Part and for the payment of death benefits and for no other purpose whatsoever.

[Emphasis Supplied]

This statute does not prohibit the direct payment to Janet F. Vicknair of benefits held by the Firefighters' Fund which are owned by her under the community property law of Louisiana.

In *Eskin v. Eskin* 518 So.2d 505 (La. 1988) the Louisiana Supreme Court specifically held that the Louisiana legislatures creation of an anti-alienation statute in a Louisiana retirement plan did not prevent the direct assertion of Louisiana community property ownership interests. Without benefit of statutory law, the Court found that the owner of a Community property interest held in a Louisiana governmental retirement Plan was entitled to direct payment of her interest. The Court further held that the owner of the interest could use judicial process to directly seize that interest from the Plan and require distribution.

In *Eskin* a former spouse obtained a judgment directing that she directly receive her community property portion of the retirement payment from the New Orleans police pension fund in a separate check. The pension fund refused to issue a separate check to Ms. Eskin after this judgment. Ms. Eskin had a writ of fieri facias issued to seize her interest in the fund. The Court held that Ms. Eskin's seizure was proper:

She is co-owner of the pension fund and entitled to a judgment ordering the retirement system to issue her a monthly check representing one-half the value of the benefits.

However, the prohibition against seizure applies only to third parties and not to co-owners

One cannot wrongfully seize a sum of money half of which he or she co-owns and which the holder refuses to divide. The writ of fieri facias was not wrongfully issued

Eskin 581 So.2d at 508 [Emphasis Supplied]

B. The 19.42% interest is directly payable under current Louisiana Statutes

R.S. 11:291 was first enacted in the next legislative session after *Eskin.* It was clearly a response to the Court's decision. R.S. 11:291 confirmed *Eskin.*

R.S. 11:291(B) directly confirms that this Court the power to issue a judgment to recover a community property interest held in a Louisiana governmental retirement plan.

The structure of Title 11 of the Revised Statutes makes it clear that the Firefighters' Fund is subject to R.S. 11:291(B). Fireman's Pension and Relief Fund In the City of New Orleans was, as originally enacted, a distinct and separate statutory retirement program. So was every other state and local retirement program in the State of Louisiana. This changed with the Louisiana Constitution of 1974. In 1988 the Legislature created Title 11, the "Louisiana Public Retirement Law.[1]" R.S. 11:2 gives the purpose of this consolidation:

The purpose of this Title is to consolidate public retirement law in order to effectively comply with the mandate of Article X, Section 29 (E) of the Constitution of Louisiana to maintain public retirement systems on a sound actuarial basis.

Under the structure of the revision each separate State and local governmental plan retains it's own statutory structure[2] but those individual plan provisions are subordinate to the overall provisions of the Title.

Municipal and Parish retirement programs are consolidated in Sub-Title IV of Title 11. All local Firefighter's Pension and Relief Funds are consolidated in Chapter 2 of Sub-Title IV. The Specific Firefighter's retirement program at issue in this litigation is set out in Part XIII of Chaper 2, R.S. 11: 3361 through 11:3390.

All of the specific statutes in the firefighter's Plan, however, are subject to the statutes in Subtitle I of Title 11 which control in the event of conflict with any specific statute in any individual plan, R.S. 11:3 ["However, the provisions of this Title shall be controlling in case of conflict with the separate laws."].

R.S. 11:291 and R.S. 11:292, contained in Subtitle I, are such specific statutes. Under it's own terms ["Notwithstanding any other provision of law to the contrary- - -"] and R.S. 11:3, R.S. 11:291 applies in this case, rather than R.S. 11:3389.

Under R.S. 11:291(B):
"Notwithstanding any other provision of law to the contrary, any benefit - - - shall be subject to a court order issued by a court upon or after termination of a community property regime, which order recognizes the community interest of - - - a former spouse of a - - - retiree of the retirement system and provides that a benefit - - - be divided by the retirement system with the - - - former spouse - - -.

[Emphases Supplied]

The legislature has clearly indicated that the power to issue a judgment in R.S. 11:291 (B) includes the power to "levy, garnish or attach." R.S. 11:291 was amended by Act 592 of 1995. In the very same Act the Legislature amended and reenacted R.S. 11:704, the exemption statute in the Teachers' Retirement System of Louisiana. This amended section in the Act read:

"Section 704. Exemption of Pension and other rights from levy and other process
The right of a person to a pension, an annuity, or a retirement allowance, to the return of contributions, the pension annuity, or retirement allowance itself, any optional benefit or any other right accrued or accruing to any person under the provisions of this Chapter, and the monies in the various funds caused by the Chapter are exempt from any state or municipal tax, all state income tax, and exempt from levy and sale, garnishment, attachment, or any other process whatever, except a provided in R.S. 11:291 and 292 and shall be unassignable except as otherwise specifically provided in this Chapter. The exemption provided herein is also applicable to cases filed under any operative chapter of the United States Bankruptcy Code (11 U.S.C).

[Emphasis Supplied]

This is a direct expression of legislative will. Judgments under both 11:291 and 1 1:292 [3] are not prohibited by statutes which prevent levy, garnishment or attachment.

C. The Firefighters' Fund has not been granted the Power by the Legislature to enact mandatory regulations which this Court must follow in dividing an interest in the Firefighters' Fund.

R.S. 11:291(B), discussed above, as currently enacted in Subtitle I of Title 11, states, in part, that a court may issue an order recognizing the community property interest of a former spouse. This Section ends with the following requirement:

> " - - - but only after a certified copy of such order has been received by the retirement system and has been determined by the retirement system to be in compliance with applicable laws, rules and regulations governing the retirement system."

This Section does not grant the power to issue mandatory regulations because that power is given to some, but not all, retirement plans in R.S. 11:291(D). R.S. 11:291 (D). as amended in 1995, is a current and modern expression of the Legislative will. This portion of the statute now states:

> In connection with Subsection B of this Section, each State or Statewide retirement system may promulgate rules establishing requirements with which a court order must comply.

The Fireman's Fund For the City of New Orleans is not a "State or Statewide retirement System." This is apparent from a simple inspection of the statutory structure of Title 11. State and Statewide retirement systems are each contained in a specific Subtitle of Title 11 of the revised statutes and the Firefighters' Fund is not included in one of those Subtitles. Subtitle II of Title 11 is entitled "State Systems" and covers those retirement programs in six different chapters. Subtitle III of Title 11 is entitled "Statewide Systems" and covers those retirement systems in nine different Chapters. The Firefighters' Fund is a part of Subtitle IV which is entitled "Municipal and Parish Systems. The statutes establishing the Firefighters' Fund, R.S. 11:3361 ff, are located at Subtitle IV, Chapter 2, Part XIII. The retirement programs of sixteen local fire departments are contained in Subtitle IV, Chapter 2.

Whatever it's authority to issue internal regulations dealing with the administration of it's retirement plan (see the next Section), the Firefighters' Fund has no express statutory authority to issue substantive regulations with which a Court Judgment "must comply" at the division of a Louisiana community property retirement plan interest. R.S. 11:291(D) on it's face does not grant such authority [4].

D. To the extent that the existing regulations of the Firefighters' Fund prohibit the division of this survivorship benefit interest they are not enforceable

The Fireman's Pension and Relief Fund is currently the only Louisiana Title 11 retirement program to have adopted formal regulations governing the division of retirement plan interests at divorce. The original regulations were adopted in June of 1990, Louisiana Register 16:501. The original regulations were adopted before the 1993 enactment of R.S. 11:291(D). Significantly amended regulations were adopted in October of 1997, Louisiana Register 16:501. The current Fireman's Fund regulations dealing with division of retirement plan interests are contained in Louisiana Administrative Code Title 58, Part 5, Chapter 1, §§ 101 - 113 [5]. The note to § 101 indicates that these regulations were in fact issued under the general authority of R.S. 11:3363. R.S. 11:3363(F) states: " The Board - - -shall make necessary rules and regulations for its government in the discharge if its duties."

The current regulations of the Firefighters' Fund appear to have been adopted under a mistake of law. § 101(A) of the current regulations reads:

> "A. Intent and Construction. These procedural rules are adopted in order to satisfy the requirements of the *Internal Revenue Code,* 26 U.S.C. §414(p), and shall be construed consistently with this purpose."

The Firefighters' Fund in this case will apparently attempt to argue that Federal law as set out in 26 U.S.C. §414(p) [which deals with Qualified Domestic Relations Orders] is binding on the Firefighters' Fund and that under Federal jurisprudence the Firefighters' Fund is prohibited from making the separate distribution requested by Ms. Janet Vicknair [6]. The allegation will be completely addressed in the next Section of this Memorandum. This next section will show that the Firefighters' Fund is actually completely exempt from the provisions of 26 U.S.C. §414(p). That Federal law does not apply to the Firefighters' Fund at all. The Firefighters' Funds regulations are not required by Federal law and Federal law cannot be used to support the position of the Firefighters' Fund.

As shown above, the existing Firefighters' Fund regulations are interpretative not statutory [7]. The Firefighters' Fund cannot refuse to recognize a valid community property interest with interpretative regulations.

IV. NO PROVISION OF FEDERAL LAW PREVENTS THE DIRECT PAYMENT REQUESTED BY JANET VICKNAIR.

A. General Background

The United States Congress in 1974 enacted a law, the Employee Retirement Income Security Act [ERISA], which imposed federal nationwide regulation on the vast majority of all private employer retirement programs. The Congress properly determined that individual workers nationwide were being unfairly deprived of benefits [8]. It is also highly probable that Congress acted because secure private retirement programs substantially reduce the economic burden of dealing with the needs of the **elderly** in federal social programs.

There was a great deal of uncertainly as to how this new law applied to the division of retirement benefits at divorce. There appeared to be stark differences between community property and common law jurisdictions. Effective January 1, 1985

Congress specifically dealt with the problem of retirement plan division at divorce as a part of the Retirement Equity Act (REA) It established an absolute prohibition against the division of private retirement benefits by a State Court at the time of divorce and then provided one limited exception. That law is discussed below.

The enacted prohibition against transfer was contained in almost identical format in two different sections of federal law. The main ERISA prohibition against transfer of a retirement plan interest and the one exception which allowed transfer because of divorce is located at 29 U.S.C §1056(d). This is a statute which preempts all contrary state laws under the federal supremacy clause, including Louisiana's community property laws. This prohibition and QDRO exception was also contained in the Federal Internal Revenue Code at 26 U.S.C. §§ 401(a)(13) [the transfer prohibition] and 414(p) [the QDRO exception]. These Internal Revenue Code provisions establish only the requirements for a tax qualified trust in a retirement program and do not have any intrinsic preemptive effect.

Both sets of statutes exempt government plans from their anti-alientation provisions and the QDRO exception to those provisions. This whole federal matrix simply does not apply to the division of governmental (State and local) retirement plans. The Fireman's Fund, in it's formal regulations, apparently acknowledges that it is exempt from the general ERISA provisions at 29 U.S.C § 1056(d) but assumes that it is covered by the provisions contained in the Federal Internal Revenue Code at 26 U.S.C. §§ 401(a)(13) [the transfer prohibition] and 414(p) [the QDRO exception]. This is a serious mistake of law central which is central to the dispute in this case. In fact, as will be shown below, the Firefighters' Fund as a govermental plan is exempt from both sets of Federal statutes. Federal law and Federal jurisprudence interpreting that law have no part in the resolution of the issues before this Court.

B. Exemption of Governmental Plans under Federal Law

1. The Federal Law of Qualified Domestic Relations Orders
29 US C § 1056 (d), as amended by REA, states, in relevant part:

> "(d) Assignment or Alienation of Plan Benefits

1. Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

2. ---

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph---

(i) the term "qualified domestic relations order" means a domestic relations order- - ."

Then follows a very complex set of statutory provisions which define the type of state court judgment which can be a "domestic relations order" (very generally orders issued in connection with divorce and separation) and sets out the requirements for a qualified order- what must be in and what cannot be in such a State Court judgment. This statute also established the unique requirement that the State Court judgment is not qualified, and hence is not effective, until the Plan administrator, who is not generally a party to the proceeding, determines that it is "qualified."

When this federal law applies it completely preempts any Louisiana community property law, *Boggs v. Boggs*, 520 U.S. 833, 117 S. Ct. 1754, 138 L.Ed2d 45 (1997) [9]

The Internal Revenue Code qualified trust anti-alienation provisions are at 26 USC §401(a)(13) and the QDRO exception is at 26 USC §414(p). The definition of a Qualified Domestic Relations Order in 26 USC §414(p) [the Internal Revenue Code] is identical to the definition in 29 USC §1056(d) [The general ERISA regulatory provision].

C. Exemption from this Federal QDRO Law for Governmental Plans

1. ERISA Exemption

29 USC §1056(d)(L) states that the provisions of all of section (d) "shall not apply to any plan to which paragraph (1) does not apply." There is a complete exemption for governmental plans from all the provisions of Title I of ERISA, 29 USC §1003(b)(l). This includes the prohibition on assignment and alienation of plan interests and the QDRO exception at 29 USC § 1056(d). Therefore, the massive power of ERISA federal preemption and the Qualified Domestic Relations Order restrictions on State Court domestic relations orders simply does not apply to government plans.

This complete exemption for governmental plans covers retirement plans of the United States as well as retirement plans of State and local government. No government plan is subject to ERISA transfer restrictions or the QDRO exception. The Office of Personnel Management is responsible for regulation of the major Federal government retirement programs. That agency has established it's own rules for State Court Orders that divide Federal retirement benefits (called "Orders Acceptable for Processing") and will not accept Orders or Judgments which follow the QDRO rules. The OPM regulation at 5 C.F.R. §838.302(a)(1) makes it clear that a QDRO does not divide federal government retirement benefits:

> "Any court order labeled as a 'qualified domestic relations order' or issued on a form for ERISA qualified domestic relations orders is not a court order acceptable for processing- - -."

A Handbook for Attorneys prepared by OPM, available on the Web at http:// www.opm.gov/retire/html/library/other.html, also states in it's introduction:

> "A substantial number of State court orders are drafted under the mistaken belief that the Employee Retirement Income Security Act (ERISA) applies to CSRS or FERS benefits. - - - Section 1003(b) and 1051 of title 29, United States Code, exempt CSRS and FERS from ERISA. Because CSRS and FERS are governmental plans- - -ERISA created the term 'qualified domestic relations order' (QDRO) to describe a court order that summarized the division of retirement benefits under ERISA plans. QDRO's are not acceptable to affect CSRS or FERS benefits.- - - To assure that the court has used our terminology, rather than ERISA's terminology, an order labeled as a QDRO is not acceptable."

This court must do for Louisiana Title 11 retirement programs what the OPM has done for Federal Plans: make it plain that the QDRO rules and restrictions do not apply.

2. Internal Revenue Code Exemption

Compliance with the QDRO rules are also not a part of the tax qualification requirements for a trust established by a governmental plan. Retirement trusts under governmental plans do have to meet some requirements to be federally tax exempt, but the QDRO rules are not part of those requirements State and local government's and their agencies are absolutely exempt from federal taxation. Retirement trusts created by a governmental agency, however, are not eligible for the same exemption. The funds in these trusts for employees belong to the employee's not the State, See, *Louisiana State Employees' Retirement*

System v. State of Louisiana, 423 So.2d 23, (1 Cir. 1982), writ denied 427 So.2d 1206 (La. 1983). Many provisions of Louisiana statutory law in Title 11 have as their only purpose assuring Federal tax qualification of the retirement trusts that physically hold the assets of the government retirement plan. This assures that the income from the trust is tax exempt and that the employees get the benefits of receiving their distributions from "qualified" retirement trusts. Government trusts are, however, exempt from a significant number of the tax qualification provisions, see for some of those exemptions the flush language cited at (v) on the page 17. Under the Internal Revenue Code government plans do not have to comply with the anti-alienation provisions, and QDRO exceptions to those provisions, to be tax qualified.

Because the Internal Revenue Code provisions do not apply on their face, this Court does not face in this situation the issue of when, if ever, Internal Revenue Code provisions can preempt Louisiana community property law.

There is a complete exemption [10] of all government plans from any QDRO rules as they are presented in the Internal Revenue Code (a simpler statement of this exemption immediately follows):

i) The Internal Revenue Code QDRO rules, which contain the one single exception to IRC retirement plan transfer restrictions, are contained in 26 U.S.C. §414(p).
ii) 26 U.S.C. §414(p)(9) states that "this subsection does not apply to any plan to which section 401(a)(13) does not apply." [§401(a)(13) is the section which contains the prohibition against transfer of benefits by a retirement plan participant and is quoted in iv below.]

iii) §401 is a long and complex statute. Section (a) is a long part of it and deals generally with provisions that trusts must contain if the retirement plan of which they are a part is to be tax qualified [ie employer gets deduction at time of contribution to plan, employee has no income until distribution from trust, and trust is exempt from taxes].

iv) §401(a)(13)(A) provides:

A trust shall not constitute a qualified trust under this section unless the plan of which the trust is a part provides that benefits provided under the plan may not be assigned or alienated.

§401(a)(13)(B) provides:

Subparagraph A shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that subparagraph (A) shall not apply if the order is determined to be a qualified domestic relations order.

v) Flush language exemption from application of Section 401 (a)(13) Between Sections 31 and 32 of §401(a) is the following "flush language" which is actually not a part of any section and relates all the way back to §401(a).

Paragraphs (11),(12), (13), (14), (15),(19) and (20) shall apply only in the case of a plan to which 411 (relating to minimum vesting standards) applies without regard to subsection (e)(2) of such section. [emphasis supplied]

vi) §411(e) states, in part:

(1) The provisions of this section (other than paragraph (2)) shall not apply to--

(A) a governmental plan (within the meaning of section 414(d)),

(2) A plan described in paragraph (1) shall be treated as meeting the requirements of this section, for purposes of section 401 (a), if such plan meets the vesting requirements resulting from the application of sections 401(a)(4) and 401(a)(7) as in effect on September 1, 1974

vii) §414 (d) states:

Governmental Plan

For purposes of this part, the term “governmental plan” means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing - - -.

Here is this complex Internal Revenue Code exemption stated in “reverse order” with specific reference to the Firefighters' Pension and Relief Fund In the City of New Orleans:
i) The Firefighters' Fund is a “government plan” under §414(d);

ii) Because the Firefighters' Fund is a government plans under Section 414(d) it is exempt from the minimum vesting standard provisions of §411.

iii) Because the Firefighters' Fund is exempt from the minimum vesting standards of §411 it is exempt from the anti-alienation provisions of §401(13).

iv) Because the Firefighters' Fund is exempt from the anti-alienation provisions of §401(13) it is exempt from the Internal Revenue Code QDRO provisions of §414(p).

Treasury Regulation 1.401(a)-(13)(a) [the regulation for the anti alienation section] confirms this governmental plan exemption from the Internal Revenue Code anti alienation provisions. It states:

> This section applies only to plans to which section 411 applies without regard to section 411(e)(2). Thus, for example, they do not apply to governmental plans within the meaning of section 414(d)

The existing regulations of the Fireman's Fund which require the application of Federal Internal Revenue Code QDRO law in the division of a benefit under that retirement program are invalid. These regulations are not withing the scope of the regulatory authority of R.S. 11:291(D). The Firefighters' Fund cannot change the community property law of Louisiana by regulation. All Louisiana retirement programs under Title 11 are government plans and should be divided at divorce only under Louisiana law.

V. MISUSE OF QUALIFIED DOMESTIC RELATIONS ORDER LANGUAGE IN LOUISIANA COURTS

A potentially very confusing situation exists in Louisiana jurisprudence. Ultimately the bar not the Judges are responsible for this confusion. Judges decide cases based on what lawyers present to them. When lawyers do not properly present the law, the decisions can be inaccurate. The domestic attorneys of Louisiana have begun to reference all judgments dividing all retirement plans (including exempt Title 11 retirement programs) as “qualified domestic relations orders” much as they might call all tissues a “Kleenex” or all photocopies a “Xerox.”

A search in Westlaw reveals that Louisiana Supreme Court has used the term “qualified domestic relations order” twice when referring to State Retirement programs. Both of those usages were improper because the specific cases then before the Court involved Louisiana Title 11 retirement programs which were exempt from the Federal QDRO rules.

Bordes v. Bordes 98-1004 (La. 4/13/99), 730 So.2d 443, dealt with a benefit from the Parochial Employees Retirement System, a Louisiana Title 11 retirement program. In this opinion this court simply states, as a part of it's factual recital (730 So.2d at 444), that the parties had agreed to enter into a Qualified Domestic Relations Order as of age 65. This was clearly an attorney misuse of the term simply repeated by all appellate courts.

Much more important and serious is *Blanchard v. Blanchard* 97-2305 (La. 1/20/99), 731 So. 2d 175. *Blanchard* involved a division in an R.S. 9:2801 partition of a retirement interest in the Teacher's Retirement System, a Louisiana Title 11 retirement program. *Blanchard* was an extremely significant and important decisions involving the application of R.S. 9:2801. It referenced “Qualified Domestic Relations Orders” only in dicta. It is important that this Court not let that dicta become a rule of law.

The appellate opinion in Blanchard reveals that it was one of the parties that requested the issuance of a “qualified domestic relations order” to divide this Teacher's pension. Reversing the decision of the trial court, this Court referenced the Plaintiff's request for a qualified domestic relations order and defined that term in footnote two of the opinion:
FN2. A Qualified Domestic Relations Order is an order “made pursuant to a state domestic relations law (including a community property law) which creates or recognizes the existence of an alternate payee's right to, or assigns an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan and relates to the provision of alimony payments, or marital property rights to a spouse or former spouse.” Elizabeth Alford Beskin, Retirement Equity Inaction: Division of Pension Benefits Upon Divorce In Louisiana, 48 La. L.Rev. 677, 683-84 (1988).

Blanchard 731 So. 2d at 177

This is the exact definition used in federal law without any reference to federal law. In the Court's general discussion of the Louisiana law of the division of pension benefits this Court again uses the term, again without reference to federal law:
Use of the “fixed percentage” method does not require valuation of the pension. Disposition of pension rights under this method involves recognition of the right of the non-employee spouse to a judgment recognizing his interest in proceeds from a retirement plan, “if, as, and when” they become payable, usually in the form of a Qualified Domestic Relations Order (“QDRO”). Id. at 922; Elizabeth Alford Beskin, Retirement Equity Inaction: Division of Pension Benefits Upon Divorce in Louisiana, 48 La. L.Rev. 677, 681 (1988).

[Emphasis Supplied]

Blanchard 731 So. 2d at 179

While these comments of the Court in *Blanchard* about Qualified Domestic Relations Orders are absolutely correct insofar as they apply to the Louisiana community property partition of a retirement plan interest covered by ERISA, they did not apply at all to the Louisiana Teacher's Plan benefit which was the subject of the *Blanchard* opinion [11] .

Louisiana Appellate cases are replete with references to QDRO's dividing state retirement plan interests. This is usually because the parties have (improperly) labeled the judgment before the Court with that title. See, for example, *McKinstry v. McKinstry'*, 36,285 (La.App. 2 Cir. 8/14/02) 824 So.2d 1260 which referenced a QDRO to divided an interest Louisiana teacher's retirement benefits.

Using the term “Qualified Domestic Relations Order” to reference a judgement which divides a state retirement interest is harmless if it is simply using the “wrong” name to describe the Judgment. If, however, it substantively effects the rights of one of the parties under Louisiana law then there is a very different situation. This case is such a situation.

1. Federal Law in not Relevant

Undersigned counsel for Janet Vicknair readily concedes that if the retirement plan paying survivorship benefits was a private plan (such as Shell, Entergy, or Bellsouth) that existing Federal QDRO jurisprudence might bar the claim of Ms. Janet Vicknair to survivorship benefits if it were determined that the judgment she obtained before the death of the Plan participant did not cover survivorship benefits. (It is the position of Ms. Janet Vicknair that her Judgment did cover such benefits).

The Federal Fifth Circuit the case of *Hopkins v. AT & T Global Information Solutions.* 105 F.3d 153 (4 Cir. 1997) dealt with an ERISA covered retirement program. Hopkins has been unequivocally adopted by the Federal Fifth Circuit Court of Appeals in *Rivers v. Central and Southwest Corporation,* 186 F.3d 681 (5 Cir. 1999). *Rivers* dealt with the express federal preemption of a Louisiana community property interest.

In *Hopkins* there was a divorce before retirement and a remarriage before retirement. At the time of retirement the benefit was mandated by Federal law-a joint and survivor annuity in favor of the wife at the time of retirement-the second wife. The first wife sought two QDROs after retirement one of which sought to declare that she was entitled to a portion of the second wife's joint and survivor annuity. The Federal Fourth Circuit held that second wife's interest in the survivorship benefit “vested” at retirement. After retirement the second wife was a “beneficiary” of the plan. A QDRO can only affect benefits “payable with respect to a participant.” After retirement the Surviving Spouse benefit is payable to a beneficiary and not “with respect to a participant” so no QDRO can be obtained affecting this benefit. A QDRO is the only way to transfer pension benefits and overcome federal preemption. If no QDRO is available after retirement, there can be no transfer of the Surviving Spouse benefit. In a similar factual situation out of Louisiana Rivers also held that the first wife could not obtain a part of the second wife's survivor benefit when the ERISA QDRO was not sought until after retirement.

These cases are simply not relevant when Federal law is not applicable.

1. DeLaune v. Modica

There is one Louisiana Appellate Court opinion, DeLaune v. Modica 99-533 (La.App. 5 Cir. 3/3/00), 762 So.2d 52) writ denied 766 So.2d 541 (6/30/2000), which the Firefighters' Fund may use to try and support it's position. It does not.

The case involved the division of a survivor benefit claim paid by the Firefighters' Fund. The case is correct as to its actual holding:

> “The holding in our original opinion is limited to a finding that Ms. Delaune is simply not entitled to proceed via a QDRO in order to obtain any portion of the benefits already paid to Ms. Modica.”

DeLasune, 762 So.2d at 55-56

The holding of the case is not relevant to the issue before this Court because here Ms. Janet Vicknair seeks to recover back payments only from Ms. Martzell Vicknair and not from the Firefighters' Fund.

Ms. Janet Vicknair seeks to have only future payments directly paid to her by the Firefighters' Fund. In fact the Trial Court in DeLaune also issued a Judgment for division of future payments almost identical to the type of Judgment sought in this in this case. That Judgment was not appealed and it was accepted by the Firefighters' Fund.

In this case the Firefighters' Fund has changed it's mind and it not willing to do what it did in *DeLaune*. That is why they were made a party and sued in this litigation.

Janet Vicknair respectfully requests Judgment as prayed for and all costs.

<<signature>>

William H. Cook, Jr. (Bar #4307), Trial Attorney

7428 Benjamin Street

New Orleans, LA 70118-3704

Telephone: (504) 861-7540

Facsimile: (504) 865-9378

Attorney for Plaintiff Janet F. Vicknair

SHERIFF PLEASE SERVE:

Firefighters' Pension and Relief Fund in the City of New Orleans

through, Richard J. Hampton, Jr., CEO and Secretary/Treasurer

329 S. Dorgenois Street

New Orleans, LA 70119

Footnotes

1 R.S. 11:1

2 There is surely no more political process than the struggle each part of the public sector makes for it's allocation of available State funds. No public sector was willing to surrender the “advantages” of it's own individual retirement program. The legislature did extremely well just to place all of these disparate interests under the same umbrella.

3 R.S. 11:292 states that a retirement benefit is subject to garnishment or court-ordered assignment to pay child support. It is not applicable to this litigation.

4 Because of the posture of this particular set of regulations undersigned counsel does not believe that this case presents the issue of the extent to which the legislative branch can authorize a part of the administrative branch to issue regulations which mandate the contents of a judgment of the Judicial branch. This substantial separation of powers constitutional issue simply does not have to be reached in this litigation.

5 This Louisiana Administrative Code Titles can be found online in a . pdf file at http://www.state.la.us/osr/lac/books.htm

6 Trial counsel for Ms. Janet Vicknair is in possession of a letter from Maria C. Cangemi, the current counsel in this proceeding for the Fire Fighters Pension and Relief Fund for the City of New Orleans, written in connection with another matter, dated March 29, 1999 which asserts that because of Federal law, specifically *Hopkins v. AT& T Global Information Systems* 105 F.3d 153 (4th Cir. 1997) the Fund would not honor a judgment of the Louisiana District Court dividing a survivor benefit payment. This letter is attached to this Memorandum.

7 As used in this sentence, statutory regulations are written under express authority of the legislature when the legislature specifically delegates to the administrative agency the power to make a “new” rule which has the effect of a statute. R.S. 11:291 (D), discussed

above, may authorize such a statutory regulation. Interpretative regulations, such as the existing regulations under R.S. 11:3363(F), organize the affairs of the administrative agency and offer the view of the agency as to how the law ought to be interpreted. While the interpretation of the agency charged with the responsibility for administering the law is entitled to serious consideration, it does not control the determination of the Court.

8 Some of the typical **abuses** were things like: i) promising retirement benefits but not funding them so they were not actually available at the time of retirement; ii) imposing unreasonable requirements for benefits which were not understood by workers, ie 30 year vesting requirements; and iii) major discrimination in the grant of benefits among different categories of workers.

9 In *Boggs* a wife died while her husband was employed. The Court held she could not leave her community property interest by inheritance because recognition of her community property interest was barred by federal preemption and the QDRO exception was unavailable.

10 The exemption is complete but complex. This kind of statutory tracing to determine the meaning of the Internal Revenue Code reminds undersigned counsel of his favorite tax quote:

> "In my own case the words of such an act as the Income Tax, merely dance before my eyes in a meaningless procession: cross- reference to cross-reference, exception upon exception- couched in abstract terms that offer no handle to seize hold of- leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time. I know that these monsters are the result of fabulous industry and ingenuity, plugging up this hole and casting out that net, against all possible evasion; yet at times I cannot help recalling a saying of William James about a certain passage of Hegel: that they were no doubt written with a passion of rationality; but that one cannot help wondering whether to the reader they have any significance save that the words are strung together with syntactical correctness."

Learned Hand, 57 Yale Law Journal 167, 169 (1947).

11 The law review article which was cited by the Court for the QDRO definition used in *Blanchard* discussed only ERISA plans. "The scope of this paper is limited to the division and distribution of benefits from a tax-qualified private plan. Insofar as government and military pension plans are both subject to their own complex regulatory schemes, they are more logically the subject of a separate enquiry." Elizabeth Alford Beskin, Retirement Equity Inaction: Division of Pension Benefits Upon Divorce in Louisiana, 48 La. L.Rev. 677, 667 (1988)

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